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"New Governance" in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping

Bradley C. Karkkainen

Reply

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Orly Lobel's provocative article *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*[1] is an ambitious and path-breaking canvass of recent academic literature on what may be termed the "New Governance."[2] The article usefully identifies, discusses, and links many of the leading strands in this scholarship, gleaned from a disparate array of specialized fields of inquiry within the

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1. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

2. I borrow the term "New Governance" directly from the title of a recent conference entitled "New Governance and Constitutionalism in Europe and the U.S.," held at the University of Cambridge (U.K.), July 19–20, 2004, addressing many of the themes identified in Lobel's article. Previous uses of the term in academic literature include R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652 (1996); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001); David M. Trubek & James S. Mosher, *New Governance, Employment Policy, and the European Social Model*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY 33 (Jonathan Zeitlin & David M. Trubek eds., 2003); Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575.

American legal academy and in the policy sciences more generally. Lobel's article also attempts to synthesize the diverse elements of this scholarship into a coherent, unifying whole. For reasons outlined below, I believe the article only partially succeeds in its synthetic ambition. It relies at times on overly broad generalizations that gloss over important differences, debates, and divergent tendencies within the field. Despite these limitations, however, *The Renew Deal* must be counted an important and arresting contribution to the scholarly literature, marking a promising debut to Lobel's career as a legal scholar.

At the risk of pedantry, let me begin with some terminological quibbles. Lobel announces the emergence of a "governance model"[3] and a "new paradigm of governance."[4] Elsewhere she coins her own neologism, "Renew Deal,"[5] apparently to signal her belief that this development is as far-reaching in its consequences as was the original New Deal, and that it exhibits both elements of continuity and yet significant departures from its forebear.

In place of Lobel's terms "governance model" and "Renew Deal," I shall substitute "New Governance," "New Governance model," "New Governance scholarship," and so on. I adopt the language of "New Governance" in part because that phrase has already established something of a following on both sides of the Atlantic. "New Governance" refers to a broad family of innovative modes of public governance, some occurring within the European Union, some within the United States, and some elsewhere.[6] Similarly, the term "New Governance scholarship" has acquired a recognized meaning, referring to scholarship on these innovative modes of public governance. Consequently, the term "New Governance" has a somewhat more definite connotation than the more generic "governance," which promiscuously embraces multiple usages, including, inter alia, the institutions of government itself, "corporate governance," "global governance," and "good governance," in addition to "New Governance."[7]

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3. *See, e.g.*, Lobel, *supra* note 1, at 344 (describing "a paradigm shift from a regulatory to a governance model").

4. *See, e.g.*, *id.* ("[C]ontemporary legal thought and practice are pointing to the emergence of a new paradigm—*governance* . . . .").

5. *See, e.g.*, *id.* at 343 (describing a "shift . . . to a 'Renew Deal' governance paradigm").

6. *See supra* note 2 and sources cited therein.

7. *See, e.g.*, Rhodes, *supra* note 2, at 652 (stating that the term "govern-

At the same time, however, "New Governance" remains a relatively bland and imprecise descriptor of this family of governance innovations, and thus is capable of neutrally encompassing the multiple distinct flavors of scholarship that jointly comprise the broad category to which both Lobel and I refer. Finally, transatlantic adoption of the term "New Governance" signals that neither the scholarship nor the underlying social phenomenon is understood to be a uniquely American development. This is a point possibly obscured by Lobel's use of the term "Renew Deal" and her repeated efforts to situate "New Governance" as successor to what she calls the "New Deal regulatory model,"[8] suggesting a largely U.S.-centric orientation.

None of these linguistic quibbles bears on the substance of Lobel's argument, of course. At bottom, Lobel's thesis is simply that a distinctive new brand of legal and policy scholarship—call it "New Governance scholarship"—has emerged in recent years. This scholarship endeavors simultaneously to chronicle, interpret, analyze, theorize, and advocate a seismic reorientation in both the public policymaking process and the tools employed in policy implementation. The valence of this reorientation, New Governance scholars argue, is generally away from the familiar model of command-style, fixed-rule regulation by administrative fiat, and toward a new model of collaborative, multi-party, multi-level, adaptive, problem-solving New Governance.

As Lobel rightly points out, the older, command-style regulatory model grew to dominance in the United States in the New Deal era,[9] but arguably it found its fullest expression a bit

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ance" embraces at least six different meanings); *see also* Adrienne Héritier, *New Modes of Governance in Europe: Policy-Making Without Legislating?*, *in* COMMON GOODS: REINVENTING EUROPEAN AND INTERNATIONAL GOVERNANCE 185, 185 (Adrienne Héritier ed., 2002) (noting ambiguity in the term "governance," which when used broadly "implies every mode of political steering involving public and private actors, including the traditional modes of government," but when used more narrowly "comprises types of political steering in which nonhierarchical modes of guidance, such as persuasion and negotiation, are employed, and/or public and private actors are engaged in policy formulation").

8. *See, e.g.*, Lobel *supra* note 1, at 343–45, 351–55.

9. *See* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 440–41 (2003) (stating that "[t]he New Deal Congress created a raft of new federal regulatory agencies and endowed them with very broad powers," and defenders of the New Deal advanced a theory of "regulatory management by experts" who would be "[g]uided by experience and professional discipline").

later, in the Great Society of the 1960s and the consumer protection and "environmental decade" of the 1970s.[10] Unquestionably, it also has rough counterparts in other legal and political cultures in Europe and elsewhere. The old regulatory model was hierarchical, state-centric, bureaucratic, top-down and expert-driven. The old model attempted to microengineer solutions to societal problems through a series of fragmentary, piecemeal, and highly prescriptive regulatory interventions,[11] and it tended to produce an impossibly complex and tangled web of rigid, uniform one-size-fits-all rules that in truth did not quite fit anyone.[12]

In contrast, the New Governance model (at least according to its proponents) breaks with fixity, state-centrism, hierarchy, excessive reliance on bureaucratic expertise, and intrusive prescription. It aspires instead to be more open-textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic. On some variants, it also aspires to be adaptive, claiming both the capacity and the necessity to continuously generate new learning and to adjust in response to new information and changing conditions, systematically employing information feedback loops, benchmarking, rolling standards of best practice, and principles of continuous improvement.[13] New Governance scholars claim to have discerned

10. *See id.* at 441–42 (stating that administrative law changed dramatically in the late 1960s in response to criticisms of agency "capture[]," "[t]he rise of public interest law," and "[a] new wave of environmental, health, safety, civil rights, and other social regulatory programs adopted by Congress as part of a 'rights revolution'"). The Environmental Protection Agency and the National Highway Traffic Safety Administration were established in 1970, the Consumer Product Safety Commission in 1972, and the Occupational Safety and Health Administration in 1973. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 26–28, 29 tbl.1-1 (5th ed. 2002).

11. *See* Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 27–38 (2001) (detailing the "shortcomings of the current U.S. environmental regulatory system," which include "fragmentation, rigidity, complexity, and high compliance and administrative costs," because the existing system "requires the development and adoption of a myriad of highly specific requirements to control the conduct of those subject to regulation").

12. *See id.* at 31–32 (stating that the information costs associated with conventional environmental regulation "lead regulators to adopt uniform measures for all sources within a given industry or other category," with the result that "requirements are not tailored to the significant variations among plants and industries").

13. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 287–88 (1998) (advocating a

the emergence of at least a nascent form of this New Governance model in disparate areas of public policy. In the United States, New Governance scholars have written on developments in, inter alia, environmental protection,[14] public school reform,[15] "problem-solving courts,"[16] health care reform,[17] workplace gender discrimination,[18] equal protection generally,[19] labor rights,[20] community policing,[21] community economic development,[22] and public law litigation.[23] In the European context, discussions of New Governance tend to focus on the European Union's Open Method of Coordination and other "soft law" approaches to policy development and coordination on a European Union-wide basis,[24] although the emergence of

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"public sector model of problem solving" based upon "linked systems of local and inter-local or federal pooling of information, each applying in its sphere the principles of benchmarking, simultaneous engineering, and error correction, so that actors scrutinize their initial understandings of problems and feasible solutions" and "learn from one another's successes and failures").

14. *See, e.g.*, Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL. L. REV. 441 (1999); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227 (1995); Charles Sabel et al., *Beyond Backyard Environmentalism*, *in* BEYOND BACKYARD ENVIRONMENTALISM 3 (Joshua Cohen & Joel Rogers eds., 2000).

15. *See* James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

16. *See, e.g.*, Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003).

17. *See, e.g.*, Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 AM. J.L. & MED. 395 (2003).

18. *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

19. *See, e.g.*, Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261 (2004).

20. *See, e.g.*, ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? (2001).

21. *See, e.g.*, Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC'Y 73 (2001).

22. *See, e.g.*, WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (2001).

23. *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

24. *See, e.g.*, Gráinne de Búrca, *The Constitutional Challenge of New Governance in the European Union*, 28 EUR. L. REV. 814 (2003); Oliver Gerstenberg & Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, *in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 289 (Christian Joerges & Renaud Dehousse eds., 2002); Héritier, *supra* note 7,

New Governance methods within European Union member states is also noted.[25]

Despite a profusion of literature and the ambitious claims of its authors, however, these developments—both the collective body of New Governance scholarship and the underlying social and political developments upon which that scholarship is predicated—have been widely underappreciated in the legal academic literature at large. There may be several reasons for this.

First, by all accounts the actual transition of New Governance approaches to public problem solving thus far has been spotty.[26] Innovations occur here and there, discernible within a number of disparate policy domains but dominant in few, and the outcomes of these scattered policy experiments remain ambiguous and contested.[27] Even the most successful experiments have yet to be replicated widely, leaving them vulnerable to the

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at 185–204; Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002); Trubek & Mosher, *supra* note 2.

25. *See, e.g.*, Christoph Demmke, *Towards Effective Environmental Regulation: Innovative Approaches in Implementing and Enforcing European Environmental Law and Policy*, Jean Monnet Working Paper 5/01 (2001), *available at* http://www.jeanmonnetprogram.org/papers/01/010501.html (arguing that "virtually no [EU] Member State can any longer be characterised as centralised," as important powers once held by national bureaucracies are increasingly decentralized or coordinated through non-hierarchical networks of decentralized actors).

26. *See* Mark Tushnet, *A New Constitutionalism for Liberals?*, 28 N.Y.U. REV. L. & SOC. CHANGE 357, 360 (2003) (arguing that experimentalism "has not yet gained the traction . . . that it ought to have"); Matt Wilson & Eric Weltman, *Government's Job*, *in* BEYOND BACKYARD ENVIRONMENTALISM, *supra* note 14, at 49, 49 ("[C]itizens' engagement in environmental matters is the exception, not the rule, and is often made necessary when government is not doing its job."); DeWitt John, *Good Cops, Bad Cops*, *in* BEYOND BACKYARD ENVIRONMENTALISM, *supra* note 14, at 61, 64 (endorsing New Governance innovations in environmental policy but characterizing such innovations as "still marginal"); Theodore J. Lowi, *Frontyard Propaganda*, *in* BEYOND BACKYARD ENVIRONMENTALISM, *supra* note 14, at 70, 72 ("[F]or every supporting case study there is almost inevitably an unsupportive case study."); Daniel A. Farber, *Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 U. ILL. L. REV. 61, 67 ("[N]o one can be certain whether these moves toward more regulatory flexibility are flukes or harbingers of the future of environmental law."); *id.* at 75 ("[W]hether today's reinvention efforts will evolve into genuine governance structures is purely speculative.").

27. *See* Tushnet, *supra* note 26, at 358–59 (arguing that the innovations in public education claimed by Sabel and Liebman are only partially confirmed by the evidence they present, indicating a "romantic tendency" toward "overclaiming").

skeptics' charge that their success depends upon factors unique to their own time, place, and fortuitous circumstances.[28] Consequently, within any given field of inquiry, New Governance approaches may appear to some to be aberrational, idiosyncratic, or unproven, and the anecdotes and case studies heralding these developments unconvincing, except to the choir of the already converted.

Some fault may also lie in the narrow, subject-specific orientation of some New Governance scholars themselves, who may neglect to link observed innovations in their own fields to broader trends in patterns of social organization elsewhere, and who may not always be attentive to where their own work fits into the broader sweep of emerging New Governance scholarship.[29] Additionally, some New Governance scholars may be more keenly attuned to the differences that separate their own work from that of others working in the same genre than to the commonalities that link them, even if at some level they recog-

28. *See id.* at 360 (noting that "[p]articular experimentalist programs get traction because of their location in particular political circumstances," but broader coordinating mechanisms and general political support are needed "if experimentalist constitutionalism as a general approach is to take hold outside the Upper West Side"); Jon Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 379, 428 (2000) (concluding that "[c]ollaborative watershed institutions, like the Chesapeake Bay Program, will be more difficult to establish in some settings than in others and, where transaction costs are high . . . may not be pursued at all").

29. To avoid pointing an accusatory finger at others, I cite as a prime example my own work, which is directed largely at New Governance in the field of environmental regulation. *See, e.g.*, Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943 (2003) [hereinafter Karkkainen, *Adaptive Ecosystem Management*]; Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189 (2002); Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555; Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001) [hereinafter Karkkainen, *TRI*]; Bradley C. Karkkainen, *Post-Sovereign Environmental Governance*, 4 GLOBAL ENVTL. POL. 72 (2004); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903 (2002) [hereinafter Karkkainen, *NEPA*]; Charles Sabel, Archon Fung & Bradley Karkkainen, *Beyond Backyard Environmentalism*, *in* BEYOND BACKYARD ENVIRONMENTALISM, *supra* note 14, at 3. The author is by no means unaware of the parallels to developments in other fields, but the body of work cited above is addressed primarily to the community of environmental law and policy scholars and only rarely references the broader New Governance literature.

nize a distant kinship.[30] Some, perhaps, may be more interested in winning debating points on the fine-grained particulars than in persuading a broader audience of the merits of the general approach.[31]

Finally, in its sheer novelty, the recent profusion of New Governance scholarship has not yet settled upon a common nomenclature, leaving even the most dedicated reader with the daunting task of sorting through and translating a bewildering babel of unfamiliar, competing, and possibly incompatible terminology, which may or may not describe similar phenomena in different terms, or different phenomena in similar terms.[32] In this area of scholarship, as in many others, contestation over naming rights appears to be half the battle, but as a byproduct it tends to generate opacity and outright confusion.

Taken as a whole, however—and setting aside for the moment both the underlying merits of New Governance approaches to public problem solving and the important conceptual differences that separate competing intellectual camps within this larger body of thought—the burgeoning New Governance literature surely represents a major trend, and arguably an important emerging intellectual movement in legal, public policy, and social science scholarship. It is high time that the participants, as well as the broader intellectual community, acknowledged as much.

The signal accomplishment of Lobel's article is that it puts us all on notice that something big is afoot here, at least in the American legal academy, probably in social science scholarship more generally, and possibly even in the world. The article sounds a clear alarm, calling to our attention the commonalities and collective thrust of the New Governance scholarship and loosely stitching together its various components within a framework pitched at a sufficiently high level of generality to be capable of holding together all its diverse parts. At that level, the article serves as a useful general introduction to the New Governance literature, more accessible to the general reader than is much of the specialized literature itself.

The article's strengths are also its greatest weaknesses, however. A high level of generality is useful up to a point. It

30. Ensconced in his own glass house, the author declines to throw footnotes.

31. *See supra* note 29.

32. *See* Lobel, *supra* note 1, at 345–47 (listing some twenty-three variants).

may allow us to discern patterns and linkages among phenomena we had not otherwise thought to connect. But it also has its costs, especially if it leads us to lose sight of the richness, variety, and distinctive qualities of the individual components that comprise the larger whole.

It is sometimes said that the two most basic intellectual moves are "lumping" and "splitting"—that is, finding relevant common characteristics that allow us intelligently and usefully to group apparently distinct phenomena into a single category ("lumping"),[33] and finding relevant distinguishing characteristics that allow us intelligently and usefully to separate otherwise similar phenomena into distinct classes ("splitting").[34] The best descriptive, interpretive, and analytical work, whether in law, medicine, biology, history, or any of a hundred other disciplines, does a good deal of both—lumping seemingly disparate phenomena into original categories that reveal unexpected patterns and lead to novel insights, while employing the chisel of penetrating distinction to sunder conventional, shopworn categories that may conceal more than they reveal. Lobel's article is uncommonly long on lumping, some of it useful, some less so. Unfortunately, it is at times short on splitting.

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33. *See* Eviatar Zerubavel, *Lumping and Splitting: Notes on Social Classification*, 11 SOC. F. 421, 422 (1996) (stating that in "lumping" things together, "we allow their perceived similarity to outweigh any differences among them"). The lumping-splitting debate is important in such disparate fields as biology, history, medicine, and law. *See, e.g.*, J.H. HEXTER, ON HISTORIANS 242–43 (1979) (stating that among historians, "[i]nstead of noting differences, lumpers note likenesses; instead of separateness, connection"); GEORGE GAYLORD SIMPSON, PRINCIPLES OF ANIMAL TAXONOMY 137–40 (L.C. Dunn ed., 1961); Craig A. Bunnell & Eric P. Winer, *Lumping Versus Splitting: The Splitters Take This Round*, 20 J. CLINICAL ONCOLOGY 3576, 3577 (2002) (noting that "[f]or several decades, there has been debate about whether breast cancer clinicians and researchers should lump or split" by treating all breast cancers as manifestations of a single disease or as a cluster of heterogeneous diseases); James A Gardner, *Coherence or Bust: Telling Tales About Election Law*, 36 CONN. L. REV. 1, 1 (2003) ("[L]umping and splitting are standard techniques in the repertoire of lawyers."). At a more basic level, lumping and splitting are said to be foundational cognitive operations. *See* Zerubavel, *supra* at 422 (stating that lumping and splitting "involve the diametrically opposite cognitive acts of assimilation and differentiation" but they "are, in fact, complementary since they are *both* necessary for carving islands of meaning out of reality").

34. *See* Zerubavel, *supra* note 33, at 424 ("Whereas lumping involves overlooking differences *within* mental clusters, splitting entails widening the perceived gaps *between* them, thereby reinforcing their mental separateness."); HEXTER, *supra* note 33, at 242 (stating that among historians, splitters "like to point out divergences, to perceive differences, to draw distinctions" and "do not mind untidiness and accident in the past").

Herewith, then, some splitting as antidote to Lobel's overzealous lumping.

Some participants in current debates over the New Governance will think Lobel's article arbitrarily conflates too many distinct strands in the literature—especially insofar as it ignores unique aspects of their own work that set it apart from the rest. Intellectual debates often rage fiercest at these close quarters, in the natural competition that develops among those working within a single genre. Here, fine distinctions may make all the difference, determining whose account best accords with observed facts, has the greatest explanatory and predictive power, is most elegant and economical, is most clearly and powerfully expressed, and ultimately is best received in the larger intellectual community. It is, of course, beyond the scope of a broad literature canvass like Lobel's to recapitulate every detail of every debate, but her account scarcely acknowledges any debate, difference, or diverging tendency among New Governance scholars. A more complete and balanced treatment of this literature would recognize that there are not only disagreements but often important incompatibilities among competing views, sometimes on questions of fundamental importance, within a family of scholars whose work is nonetheless seen from a more distant perspective as broadly related.

Some participants in these debates may also object to what they regard as oversimplified or anodyne treatments of their work, which they may regard as potentially misleading. In some cases, scholars may even think that by lumping them together with others in broad-brush characterizations of New Governance scholarship as a whole, Lobel mischaracterizes their work and attributes to them views which they do not in fact hold.

All of this is to say that, much like the uniform one-size-fits-all rules that New Governance scholars criticize, Lobel's highly general, one-size-fits-all statement of a New Governance credo is probably not an accurate reflection of anyone's views, save perhaps Lobel's own. A few examples will suffice. I draw these primarily from my own field of expertise, environmental law and policy, as well as from the "democratic experimentalist" strain within the broader New Governance literature where

many of my closest collaborators situate themselves[35] and where some of my own intellectual commitments lie.

I. REFLEXIVE LAW VS. DEWEYAN EXPERIMENTALISM

Lobel relies heavily on the "autopoietic" and "reflexive law" theories of the German legal theorist Gunther Teubner to establish the rationale for a shift from the conventional regulatory model to a New Governance approach.[36] Lobel is, of course, entitled to use all or part of Teubner's work as a foundation for her own views. But here, as at other crucial points in the article, there is ambiguity as to whether Lobel is merely stating her own views, or instead purporting to characterize the views that define New Governance scholarship as a whole. To the extent the article appears to imply a consensus among New Governance scholars with respect to the role of Teubner's theories of autopoiesis and reflexivity in providing the theoretical underpinnings for their work, it is misleading.

Teubner is, to be sure, an important, original, and influential thinker, and some New Governance scholars have invoked his work to provide theoretical grounding for their own intellectual constructs.[37] However, most New Governance scholars do not subscribe to Teubner's theories, relatively few base their own work on it, and some find his thinking incompatible with their own.[38]

Teubner himself emphasizes the "radical constructivism" of his view, stating that "the theory of law as an autopoietic system stresses law's autonomy, its normative closure, structural

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35. Principals in the POPPS collaborative research effort—Mike Dorf, Archon Fung, Chuck Sabel, Bill Simon, Dara O'Rourke, and myself—include many of the chief expositors of "democratic experimentalism."

36. *See* Lobel, *supra* note 1, at 361–65, 405–06 tbl.2.

37. *See, e.g.*, Orts, *supra* note 14, at 1254–55 (attributing the idea of "reflexive law" to "legal theorists working in the Weberian tradition of social theory, most notably Gunther Teubner"); Eric W. Orts, *Autopoiesis and the Natural Environment*, *in* LAW'S NEW BOUNDARIES: THE CONSEQUENCES OF LEGAL AUTOPOIESIS 159 (Jiří Přibáň & David Nelken eds., 2001) [hereinafter Orts, *Autopoiesis*]; Sanford E. Gaines, *Reflexive Law as a Legal Paradigm for Sustainable Development*, 10 BUFF. ENVTL. L.J. 1 (2002).

38. *See* Michael C. Dorf, *The Domain of Reflexive Law*, 103 COLUM. L. REV. 384, 398–99 (2003) (reviewing JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM (2002)) (rejecting Teubner's theory of autopoiesis but claiming that democratic experimentalism represents a distinctively non-Teubnerian variant on the principle of reflexivity); Orts, *Autopoiesis*, *supra* note 37, at 159 (acknowledging that in the United States, adoption of the autopoietic theory of law "has been halting").

determination, dynamic stability, emerging eigenvalues in binary codes and normative programs, and its reflexive identity."[39] In this closed, autonomous, self-contained, and self-regulating system, Teubner argues, law consists of an endless, self-reproducing "chain of operations," a "self-referential circularity where validity becomes a circular relation between rule making and rule application."[40]

On Teubner's (and derivatively, Lobel's) account, the crisis of substantive regulatory law emerges from mismatches that arise when law attempts to colonize and control other, similarly self-referential, self-reproducing social subsystems. Regulatory law turns out to be either undereffective because it makes insufficient alterations in the internal dynamics of the subsystems it seeks to regulate, or too intrusive and therefore destructive of the internal dynamics of the regulated subsystems, or distorted insofar as it suffers from a kind of reverse colonization or "capture" by the very fields it seeks to regulate.[41] The solution, according to Teubner (again via Lobel), is to adopt "reflexive" legal strategies that aim to influence a restructuring of the internal dynamics of the regulated subsystems so as to achieve the stated regulatory objective through dynamic self-regulation within the internal, self-reproducing operations of the regulated sphere.[42]

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39. Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 LAW & SOC'Y REV. 763, 764 (1997).

40. *Id.* at 764–65.

41. *See* Lobel, *supra* note 1, at 363–64; Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239, 274 (1983) [hereinafter Teubner, *Reflexive Elements*] (noting that "[s]ubstantive legal rationality . . . attempts to regulate social structures by legal norms . . . follow[ing] criteria of rationality and patterns of organization which are poorly suited to the internal social structure of the regulated spheres," with the result that "law as a medium of the welfare state either turns out to be ineffective or it works effectively but at the price of destroying" the very social spheres it seeks to regulate); Gunther Teubner, *Juridification — Concepts, Aspects, Limits, Solutions*, *in* JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 3, 21 (Gunther Teubner ed., 1987) [hereinafter Teubner, *Juridification*] (stating the "regulatory trilemma" in which every regulatory intervention based upon "the notion that law or politics could have a direct goal oriented controlling influence on sectors of society" is "either irrelevant or produces disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself").

42. *See* Teubner, *Reflexive Elements*, *supra* note 41, at 274 (stating that a "reflexive orientation . . . seeks to identify opportunity structures that allow legal regulation to cope with social problems without, at the same time, irreversibly destroying valued patterns of social life," leading to "the policy of pro-

The theory is an intriguing one, and it has led some New Governance scholars to call for "reflexive law" solutions akin to those Teubner advocates. However, New Governance scholarship also embraces many strands beyond Teubnerian autopoiesis and reflexivity. Indeed, many of the developments and proposals that Lobel reports elsewhere in her article cannot be reduced to, and arguably are incompatible with, Teubnerian reflexivity.[43]

Many, and probably most, New Governance scholars have simply found it unnecessary to embrace Teubner's controversial and far-reaching theories. For some, the empirical observation that conventional regulatory mechanisms either are not working or are approaching the limits of their effectiveness is enough to justify, on purely instrumental grounds, the turn to a more open and collaborative style of decision making, which is thought to bring with it certain epistemic and legitimacy advantages over conventional bureaucratic approaches.[44]

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ceduralization under which the legal system concerns itself with providing the structural premises for self-regulation within other social subsystems"); Orts, *supra* note 14, at 1232 ("[R]eflexive environmental law aims to establish self-reflective processes within businesses to encourage creative, critical, and continual thinking about how to minimize environmental harms.").

43. *See* Farber, *supra* note 26, at 61–62 (identifying three distinct models of environmental "reinvention": a reflexive "self-regulation" model, a multilateral and collaborative "governance" model, and a bilateral and quasi-contractual "bargaining" model); Fiorino, *supra* note 14, at 466 (distinguishing Teubner's reflexive law approach from an equally robust New Governance literature on "social-political governance" and a third strand based on a "policy-learning perspective," and concluding that the latter "offers the most comprehensive explanation of and prescription for policy change"); Orts, *Autopoiesis*, *supra* note 37, at 174–75 (distinguishing "reflexive law" from "informational regulation" and "environmental contracts" as distinct categories of environmental law reform); Stewart, *supra* note 9, at 448–50 (distinguishing "reflexive law" approaches in which "government develops frameworks and communication channels to promote self-regulating measures by nongovernmental entities" from more direct collaboration through "flexible agency-stakeholder networks for innovative regulatory problem-solving" in which "federal agencies are active, often dominant partners in the process, and the result is a quasi-contractual working relationship among the participants to solve regulatory problems on a coordinated basis"). For his part, Teubner at times seems prepared to embrace a wide array of New Governance innovations as forms of "indirect regulation" that attempt to avoid the problems associated with "juridification." *See* Teubner, *Juridification*, *supra* note 41, at 33–38 (characterizing RegNeg, regulatory contracting, quasi-regulatory "[b]argaining in the shadow of law," and various forms of proceduralization as forms of "indirect regulation[]" arising in response to the juridification problem).

44. *See, e.g.*, Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 63 (2000) (arguing that regulatory negotiation is "a superior process for generating information, facili-

Others, grounding their own work in philosophical pragmatism—what John Dewey himself labeled "experimentalism"[45]—are even more deeply skeptical of Teubner's systems theory-based approach, which both implies and demands a hyper-rationalist capacity to map and reengineer the internal dynamics of complex social systems so as to achieve the self-regulating reflexivity that Teubner recommends. Writings of the "democratic experimentalist" camp, in particular, emphasize the inherent and inescapable epistemic constraints that limit our ability to map and devise comprehensive solutions to complex and dynamic social problems, militating in favor of a regulatory architecture that embraces the provisionality, revisability, and experimental character of all policy determinations.[46] From the democratic experimentalist perspective, it is both not enough and too much to attempt to address complex problems by reengineering institutions so as to set up Teubnerian self-regulating reflexive law solutions. It is "not enough" because ongoing interventions and policy adjustments will always be necessary in light of experience and new learning.[47] It is "too much" because the quest to use law to engineer perfectly self-regulating, self-equilibrating reflexivity within otherwise autonomous spheres of activity is itself an impossibly ambitious undertaking given background epistemic constraints.[48]

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tating learning, and building trust," and that it "increases legitimacy, defined as the acceptability of the regulation to those involved in its development"); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 6 (1997) (arguing that "the goals of efficacy and legitimacy are better served by a model that views the administrative process as a problem-solving exercise in which parties share responsibility for all stages of the rule-making process, in which solutions are provisional, and in which the state plays an active, if varied, role").

45. *See* Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261, 287–89 (2004) (outlining Dewey's "experimental" method of addressing social problems, in which "policies and proposals for social action [are] treated as working hypotheses" that must be "subject to ready and flexible revision in the light of observed consequences" (quoting JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 202–03 (1927))).

46. *See* Sabel et al., *supra* note 14, at 9, 13–14 (stating that democratic experimentalism "discounts the possibility of central, panoramic knowledge" and contrasting this with conventional regulation's "claim to a modest omniscience").

47. *See* Dorf & Sabel, *supra* note 13, at 315 ("A central lesson of the limitations of New Deal institutions is that effective government services and regulations must be continuously adapted and recombined to respond to diverse and changing local conditions . . . .").

48. *See id.* at 284–85 (grounding democratic experimentalism in a pragmatist approach to "problem solving in a world . . . that is bereft of first princi-

What is required instead, democratic experimentalists argue, is a centrally coordinated and monitored system of parallel local experiments, networked and disciplined through structured information disclosures and monitoring requirements, subject to rolling minimum performance benchmarks but otherwise free to experiment in a continuous and ceaseless effort to improve, learn, and revise.[49] Such a regulatory architecture, aimed at structuring ongoing social and institutional learning while acknowledging the inescapable fallibility and revisability of what is learned, contemplates neither the degree of self-regulating autonomy nor the self-equilibrating reflexivity of Teubnerian systems. Democratic experimentalism thus represents a distinctly pragmatist, non-Teubnerian take on both the theoretical foundations for New Governance, and on the instrumentalities and institutional mechanisms appropriate to its successful implementation.

II. "SOFTNESS" IN LAW

Lobel also makes much of "softness" in New Governance approaches, which she equates variously with flexibility,[50] non-coerciveness,[51] informalism,[52] less rigid procedural requirements,[53] and nonenforcement or nonenforceability.[54]

Here, Lobel is careful to acknowledge that New Governance scholarship embraces a range of (possibly incompatible) views as to what kind and degree of "softness" in law is appro-

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ples and beset by unintended consequences," in which "experience will again and again disrupt our habits and the understandings that rest on them"); *id.* at 285 n.59 (contrasting this non-equilibrium approach with other views that "portray behavior and institutions as conducive to or resulting from some self-reinforcing pattern or equilibrium").

49. *See id.* at 345–46 (describing a democratic experimentalist regulatory architecture in which administrative agencies form "the continuing organized link between the national and the local, helping to create through national action the local conditions for experimentation" and ensuring transparency, accountability, and discipline through "benchmarking comparisons and regulation through benchmarking"); Sabel et al., *supra* note 14, at 6–7, 13–15 (describing a "rolling-rule regime" in which local units are free to experiment within broad limits, subject to rolling minimum performance benchmarks and detailed monitoring and reporting requirements).

50. *See* Lobel, *supra* note 1, at 388–89.

51. *See id.* at 388.

52. *See id.* at 388–89.

53. *See id.* at 390–91.

54. *See id.* at 392–93.

priate, and why.[55] Yet Lobel does not pause long enough to articulate any particular view as to what kind and degree of "softness" is needed, much less to contrast competing positions in the debate. Instead, the reader is presented with a long menu of "soft" legal forms, coupled with an undifferentiated array of arguments drawn from disparate sources as to when and why one or more of those "soft" forms are appropriate. This confusing stew may lend the false impression that New Governance scholars are collectively desperate to latch onto some, perhaps *any* form of "softness," without being able to articulate a coherent rationale for doing so or to agree upon what form such "softness" should take.

This impression is unfortunately reinforced and exacerbated by Lobel's Table 2, summarizing the key differences between the "New Governance Model" and the "Traditional Regulatory Model."[56] There, Lobel summarily characterizes the "power of law" under the New Governance Model as "'[s]oft,' [a]spirational, [g]uidance, [v]oluntary, [and] [s]tructured but unsanctioned," and contrasts this with the Traditional Regulatory Model, where law is understood to be "'[h]ard,' [c]oercive, [r]ules, [m]andatory, [and] [s]anctioned."[57]

I would be hard pressed to identify any New Governance scholar who advocates such across-the-board "softness" in all aspects of law as appears in Lobel's Table 2. If any are out there, their work surely lies at the outer margins of New Governance scholarship.

It would be less misleading, perhaps, to say that most New Governance scholars acknowledge the necessity for some or many forms of "hardness" in law, and would deviate from that, if at all, only by admitting "softness" in one or a few aspects of the legal regime they envision. At one extreme, for example, are advocates of negotiated rulemaking (RegNeg) and other contractarian approaches, categories Lobel herself includes in the universe of recognized forms of New Governance.[58] On standard accounts, negotiated rulemaking and environmental contracting are not about "softness" at all. Instead, they are al-

55. *See id.* at 388 ("There is a wide spectrum of what softer processes and increased flexibility might mean for law reform."); *id.* at 393 ("As with other principles of the governance model, different rationales abound as to why, in certain contexts, soft mechanisms may be preferable to hard regulation.").

56. *See id.* at 405–06 tbl.2.

57. *Id.*

58. *See id.* at 377–78.

ternative, consensual or consent-based procedures for arriving at conventionally "hard"—that is, fixed, definite, formal, ultimately coercive, enforceable and enforced—regulatory rules.[59] Nor are these alternative rulemaking procedures understood to be less formal than conventional top-down administrative rulemaking processes. Indeed, many advocates of RegNeg and environmental contracting are sticklers for procedural specificity and regularity, out of concerns that in the absence of such procedural safeguards either regulators or regulated parties might be tempted to "game" the negotiating process.[60]

Other New Governance scholars would admit only a bit more "softness" here and there. Eric Orts, for example, in discussing environmental impact assessment as a form of "reflexive" environmental law, freely acknowledges the necessity of mandatory procedural rules, backed by coercive sanctions for noncompliance, to generate the desired self-regulatory reflexivity.[61] Nor is my own work on mandatory information disclosure as an alternative form of environmental regulation[62] wholly reliant upon voluntarism or unsanctioned, aspirational norms. Instead, it envisions mandatory rules, ultimately backed by coercive sanctions, to compel detailed disclosures of specified kinds of information. The information thus revealed is expected not only to result in a better informed, better calibrated con-

59. *See, e.g.*, Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 33–36 (2000) (detailing procedures under the Negotiated Rulemaking Act, in which negotiations that successfully reach a consensus proposal trigger a Notice of Proposed Rulemaking and promulgation of a conventional, legally enforceable regulatory rule).

60. *See, e.g.*, Derek Raymond McDonald, *Judicial Review of Negotiated Rulemaking*, 12 REV. LITIG. 467 (1993) (generally endorsing negotiated rulemaking but arguing that concerns about agency accountability, interest group participation, and adequate representation of the public interest militate in favor of careful judicial review and institutional measures to ensure the participation of all affected interests on an equal basis).

61. *See* Orts, *supra* note 14, at 1268 (suggesting mandatory annual individual or household environmental impact reporting with the aim to "increase the amount of self-reflection and social communication concerning serious environmental issues").

62. *See* Karkkainen, *TRI*, *supra* note 29, at 261 (arguing that the EPA's mandatory Toxics Release Inventory disclosure scheme "both compels and enables facilities and firms to monitor their own environmental performance" and enables "internal and comparative benchmarking" that unleashes both internal and external pressures for improvement) (emphasis omitted); Karkkainen, *NEPA*, *supra* note 29, at 971 (urging reforms in the environmental impact assessment process to require additional post-decision monitoring and adaptive mitigation measures).

ventional regulatory process capable of singling out chronically underperforming facilities, firms, and sectors for priority regulatory interventions, but also to unleash an array of informal and indirect pressures for performance improvement, not least among these the anticipatory fear that harsher (formal, mandatory) regulation may be forthcoming if the underperformers do not undertake improvements on their own initiative. There is, to be sure, some element of "softness" in both Orts's vision of reflexive environmental law and my work on information-based environmental regulation, insofar as both ultimately rely on self-initiated improvements in environmental performance undertaken within an incentive system created by a mandatory legal framework. But that element of "softness" is carefully cabined and operates only in concert with harder legal rules that set the overall context.

Other variants on New Governance would employ different mixes of "hard" and "soft" legal rules. Michael Dorf and Charles Sabel's version of democratic experimentalism, for example, contemplates mandatory participation in local problem-solving experiments under the discipline of mandatory (but rolling) minimum performance standards set and periodically revised by a central coordinating body,[63] coupled with a reserved coercive power on the part of the center to intervene for purposes of forcing reconsideration and reconfiguration of local experiments gone seriously awry.[64] To characterize this complex and subtle blend of interdependent "hard" and "soft" instruments as merely "soft, aspirational, guidance, voluntary, and structured but unsanctioned" is to do it a grave injustice.[65]

One of the persistent and pervasive misconceptions about New Governance is that it is wholly reliant on "soft law" mechanisms, and therefore ultimately dependent on the good

63. *See* Dorf & Sabel, *supra* note 13, at 350–52, 354–56 (stating that experimentalist regulation would engage in rulemaking through "learning-by-monitoring," setting "rolling best-practice rules," and linking "benchmarking, rulemaking, and revision so closely with operating experience that rulemakers and operating-world actors work literally side by side"); Sabel et al., *supra* note 14, at 8 ("Central authorities ensure that local units live up to their commitments by coordinating their activities, monitoring their performance, pooling their experiences, and enforcing feasible standards that emerge from their practice.").

64. *See* Dorf & Sabel, *supra* note 13, at 349 (stating that "[t]ruculence would be sanctioned initially by the administrative agency," but "aggrieved citizen users" would have a "statutory right to participation" enforceable by judicial review).

65. *See supra* note 57 and accompanying text.

intentions and voluntary actions of parties who heretofore have shown little inclination toward acting in the desired directions. On those grounds, it is easily dismissed by its misinformed critics as so much wishful thinking.[66] A careful and sympathetic reading of Lobel's article indicates that she does not share that misconception. Unfortunately, given its incomplete and potentially misleading discussion of the role of "soft law" in New Governance, the article does less than it might to dispel that myth, and inadvertently may reinforce it.

III. CIVIC ENVIRONMENTALISM VS. OTHER SHADES OF NEW ENVIRONMENTAL GOVERNANCE

Lobel lumps together all New Governance scholarship in the area of environmental law and policy under the rubric of "civic environmentalism"[67]—a satisfactory term, perhaps, had that brand name not already been appropriated by a few scholars whose work is unrepresentative of the field as a whole.

Lobel is not the first to make this mistake. One of the most vitriolic critics of New Environmental Governance, Rena Steinzor, has repeatedly done so in a series of articles attacking these approaches,[68] although one suspects that Steinzor's broad-brush lumping may be an element in a calculated rhetorical strategy that permits her to attack New Governance generally by singling out some of its most vulnerable variants. This, then, is an opportunity to set that record straight.

In plain fact, not all New Governance scholars in this field subscribe to the tenets of "civic environmentalism" as advanced

66. *See, e.g.*, Jacqueline Savitz, *Compensating Citizens*, *in* BEYOND BACKYARD ENVIRONMENTALISM, *supra* note 14, at 65, 65 (dismissing some New Governance proposals as "more a wishful fantasy than a true analysis of any reorientation in environmental regulation," involving "portray[ing] a world in which win-win situations abound, limited only by our willingness to build partnerships and work together through a participatory dialogue").

67. *See* Lobel, *supra* note 1, at 424 ("Increasingly, scholars advocate a new approach to environmentalism known as—*civic environmentalism*.").

68. *See* Rena I. Steinzor, *Myths of the Reinvented State*, 29 CAP. U. L. REV. 223, 233–35 (2001) (posing the fundamental question in environmental policy as a stark choice between top-down, command-style regulation and "civic environmentalism," a "bottom up" approach based on voluntarism, good intentions, and wishful thinking); Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 ENVTL. L. REP. 10,909 (2000) (lumping together all New Governance proposals under the rubric of "civic environmentalism" and attacking the latter on grounds that its terms are subject to manipulation by opponents of environmental protection).

by the leading proponents of that term, DeWitt John[69] and William Shutkin.[70] Nor has the term "civic environmentalism" itself gained widespread currency, except perhaps among its critics.

It is not even clear that John and Shutkin themselves mean the same thing by "civic environmentalism."[71] John's variant emphasizes above all devolution of environmental policymaking and policy implementation to state and local levels of decision making (whether in governmental, private, or hybrid public-private institutional settings),[72] coupled with high levels of citizen participation[73] and a general preference for voluntary solutions over regulatory interventions.[74] John's "civic environmentalism" thus can be seen to rest on three distinct but overlapping policy presumptions: a subsidiarity principle urging that decisions be made at the most localized level appropriate to the problem, a general presumption in favor of participation by as many parties as have an interest in the matter at hand, and a presumption in favor of voluntary action over coercion whenever and to whatever extent the voluntary approach is capable of contributing to meaningful solutions to the problem at hand.

Shutkin's version of "civic environmentalism" arises in a rather different context. Shutkin focuses on the need for inter-

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69. *See generally* DEWITT JOHN, CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES (1994); John, *supra* note 26.

70. *See generally* WILLIAM A. SHUTKIN, THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY-FIRST CENTURY (2000) [hereinafter SHUTKIN, THE LAND THAT COULD BE]; William A. Shutkin, *Realizing the Promise of the New Environmental Law*, 33 NEW ENG. L. REV. 691 (1999) [hereinafter Shutkin, *Realizing the Promise*].

71. *See* SHUTKIN, THE LAND THAT COULD BE, *supra* note 70, at 15–16 (distinguishing his own conception of "civic environmentalism" from John's on grounds that the latter "focuses mainly on the role of states and municipalities" and is "more technical," while Shutkin "put[s] more stock in the overall efficacy of and need for certain traditional regulatory schemes").

72. *See* JOHN, *supra* note 69, at 7 ("The central idea animating civic environmentalism is that in some cases, communities and states will organize on their own to protect the environment, without being forced to do so by the federal government.").

73. *See id.* at 10 (stating that civic environmentalism is characterized by "bargaining among a diverse set of participants" and a "collaborative" approach).

74. *See id.* at 9–10 (stating that in contrast to command-and-control regulation, "civic environmentalism uses a variety of tools, such as technical assistance to farmers and small businesses, subsidies, public education, and new approaches to investing in public services and facilities").

governmental, intersectoral, and public-private collaboration in long-term regional "eco-development" planning. Planning efforts would be centered in new coordinating and networking institutions that "by design, can link and coordinate the various existing stakeholders across each sector, while adding value through disseminating and deploying knowledge and information about best practices, storehousing lessons, ideas, and networks, facilitating local planning and community development strategies, and enacting public values and vision."[75]

These regional planning efforts, in Shutkin's view, should be broadly participatory, "empowering a diverse set of stakeholders to work to improve and protect our natural resources . . . while building social capital . . . and promoting sustainable economic development."[76] Thus Shutkin's civic environmentalism "embraces the Western tradition of civic humanism or civic republicanism, which holds that the *summum bonum* of society is the full participation of equal citizens."[77]

Both John and Shutkin, then, would devolve a significant share of environmental policy responsibility to more localized levels, in fora that allow for and encourage citizen engagement in the policy process. Both would deemphasize nationally uniform, narrowly subject-specific (and therefore collectively fragmentary) rules. Both advance process-oriented solutions.

There the similarity ends. John's vision conjoins conventional notions of federalism and subsidiarity[78] with an unvarnished faith in the good will of citizens and the power of voluntary action to solve certain kinds of environmental problems—albeit backstopped by coercive rules and national-level policies where necessary and appropriate.[79] Shutkin's vision, on the other hand, is in part the rational planner's utopia, in which comprehensive land use planning, economic development planning, and natural resources management are joined at the hip, carried out at regional scales, and subordinated to, or at least

75. Shutkin, *Realizing the Promise*, *supra* note 70, at 702.

76. SHUTKIN, THE LAND THAT COULD BE, *supra* note 70, at 14–15.

77. *Id.* at 28.

78. *See* JOHN, *supra* note 69, at 271–82 (arguing that states hold a "comparative advantage" over the federal government in addressing some kinds of environmental problems and in using some kinds of non-regulatory policy tools).

79. *See id.* at 14–16 ("Civic environmentalism is not a replacement for traditional regulatory policies; it is rather a complement to those policies."); *id.* at 297 ("[T]he federal government must support bottom-up initiatives by maintaining a strong regime of top-down regulation.").

significantly constrained by, ecological considerations. But it also embraces a civic republican commitment to full citizen participation in the planning process, valued as much for its democracy-enhancing character as for its problem-solving ability.[80] The product of such regional comprehensive planning efforts undoubtedly would include the usual output of land use and economic development planning: some mixture of mandatory use restrictions, conditions on development approvals, and financial incentives, albeit aligned in more coherent, coordinated, and ecologically sensitive patterns than we now see.[81]

Arguments can be made on behalf of either John's or Shutkin's version of "civic environmentalism," but it is probably a mistake to conflate them. It is even more problematic to conflate either variant with the wide range of New Governance approaches that Lobel lumps together under the general label of "civic environmentalism."[82] It is doubtful, for example, that Eric Orts's vision of "reflexive environmental law," which expressly draws its inspiration from Teubner, can be fairly regarded as an expression of either John's or Shutkin's version of "civic environmentalism."[83] Ditto for efforts to nudge regulatory enforcement programs in the direction of emphasizing voluntary corporate compliance with fixed, conventional, federal regulatory rules—a laudable idea perhaps, but one that appears to embrace neither Teubner-inspired reflexive self-regulation, nor the locally oriented, John- or Shutkin-inspired variants of "civic environmentalism."[84]

That brings us, finally, to Habitat Conservation Plans (HCPs) under the Endangered Species Act, a program whose meaning and potential are deeply contested both within New

80. *See* SHUTKIN, THE LAND THAT COULD BE, *supra* note 70, at 14 (defining "civic environmentalism" as "the idea that members (stakeholders) of a particular geographic and political community—residents, businesses, government agencies, and nonprofits—should engage in planning and organizing activities to ensure a future that is environmentally healthy and economically and socially vibrant at the local and regional levels"); *id.* at 15–16 ("[M]y conception of civic environmentalism moves beyond the confines of environmental policy and administration to the arena of civic life in the broad sense.").

81. *See id.* at 15 ("I put more stock in the overall efficacy of and need for certain traditional regulatory schemes than [John] does . . . .").

82. *See* Lobel, *supra* note 1, at 424–32.

83. *See id.* at 425–26 (stating that "[e]nvironmental law scholars suggest that policy should engender a practice of environmentally responsible reflexive management," and citing Orts's work and the NEPA as examples).

84. *See id.* at 425–28 (citing literature on "cooperative implementation" and voluntary compliance with federal environmental regulations).

Governance scholarship and in the broader policy literature. HCPs allow for partial waivers of the federal Endangered Species Act's otherwise rigid prohibition on the "taking" of (i.e., harm to) listed fish and wildlife species upon regulatory approval of a HCP designed to "minimize and mitigate" harm to the listed species, provided the harm falls within statutorily specified parameters.[85]

To some enthusiasts, this represents a sensible procedural vehicle for achieving a workable compromise between private property rights, economic development needs, and the aspirational but sometimes economically unrealistic goals of endangered species protection in concrete, particularized settings.[86] To some environmentalist critics, HCPs represent the worst tendency to sacrifice environmental standards at the altar of crass economic self-interest, and thus invite erosion of the animating principles of the Endangered Species Act, the most determinedly and single-mindedly eco-centric of all federal environmental laws.[87] To some property rights critics, HCPs represent a form of government-sponsored extortion, a means by which government exacts diffuse and uncompensated public benefits from private landowners through coerced bargaining under the threat of even harsher regulatory consequences.[88]

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85. *See* Endangered Species Act, 16 U.S.C. § 1539 (2000).

86. *See, e.g.*, Donald J. Barry, *Opportunity in the Face of Danger: The Pragmatic Development of Habitat Conservation Plans*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 129, 129 (1998) (describing HCPs as "probably the most important development for endangered species conservation since the passage of the original [Endangered Species] act"); *id.* at 131 (characterizing HCPs as a strategy "to try and reconcile endangered species conservation with economic development"); Timothy Beatley, *Habitat Conservation Plans: A New Tool to Resolve Land Use Conflicts*, 7 LAND LINES (Lincoln Institute of Land Policy, Cambridge, M.A.), Sept. 1995, *available at* http://www.lincolninst.edu/pubs/pub_detail.asp?id=539 (describing HCPs as a "mechanism to balance development and conservation" that has resulted in "considerable progress in habitat conservation").

87. *See* John Kostyack, *Reshaping Habitat Conservation Plans for Species Recovery: An Introduction to a Series of Articles on Habitat Conservation Plans*, 27 ENVTL. L. 755, 757 (1997) (noting that "[s]ome in the environmental movement have castigated the very concept of the HCP as an unwarranted concession to developers and resource extraction interests, a concession that they claim is by definition harmful to imperiled species"). Kostyack himself takes a more nuanced view, arguing that HCPs should be reformed, not abandoned, and if reformed could play a positive role in conservation. *See id.* (arguing that if properly structured, "HCPs potentially can bring about conservation gains that could never be achieved by sole reliance upon the prohibitions of the Endangered Species Act").

88. *See, e.g.*, Press Release, Competitive Enterprise Institute, Sugg De-

To one group of New Governance scholars, HCPs are a straightforward example of environmental contracting, a mutually beneficial agreement between regulator and regulated in which each is able to advance her position through a voluntary, reciprocal exchange of valuable promises.[89]

To Chuck Sabel, Archon Fung, and myself writing a few years ago, on the other hand, HCPs represented a tantalizing but painfully incomplete expression of the potential to reconstruct U.S. environmental policy along pragmatic, democratic experimentalist lines.[90] The HCP program suggested the possibility of a nationwide network of local experiments in integrated regional ecosystem management. Each HCP would be tailored to local conditions but also subject to extensive monitoring and reporting requirements, and would operate under "adaptive management" principles. Those principles would demand periodic adjustments in management measures as conditions changed, as monitoring and science produced new understandings of what conservation measures were possible and needed, and as innovative management interventions were field-tested in practical application. In the full democratic experimentalist variant, we posited, a central coordinating body—the Fish and Wildlife Service or its successor—would be the repository of monitoring data and lessons learned from this network of local experiments, providing the information base for horizontal diffusion of best practices and rolling improvements in both institutional design and management techniques.

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nounces Disinformation on ESA Reform (Mar. 4, 1998), *available at* http://www.cei.org/gencon/003,02730.cfm (denouncing HCPs as "vast centralized zoning schemes that operate as legalized extortion rackets" and "force landowners to pay the government for permission to use their own land").

89. *See* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 194–95 (2000) (placing HCPs among a family of "contractual" approaches to environmental regulation); Jason Scott Johnston, *The Law and Economics of Environmental Contracts*, *in* ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 271, 273–75 (Eric W. Orts & Kurt Deketelaere eds., 2001) (listing HCPs as one of three important types of environmental contracts); Stewart, *supra* note 11, at 73–75 (listing HCPs among a series of contractarian reforms of environmental law).

90. *See* Sabel et al., *supra* note 14, at 30–36 (arguing that HCPs can "illuminate the promise of the new regulatory regime," but criticizing the overall program for lack of effective information pooling and inconsistent commitments to monitoring and broad multi-party participation).

Unfortunately, the reality fell far short of that aspiration. Most HCPs, it turned out, were simple, single-parcel, single-species deals, not bold experiments in integrated regional ecosystem management.[91] Most included trifling, if any, monitoring and reporting requirements.[92] Few incorporated principles of "adaptive management,"[93] and even those that did relied upon a very narrow, constrained understanding of what "adaptive management" implied.[94] Perhaps most troubling of all, there was no systematic effort at central coordination, monitoring, information-pooling, and institutional learning. Instead, responsibility for negotiating HCPs and enforcing their terms was a responsibility assigned to regional and field offices, each operating largely by its own lights. In short, there was no center, no functioning network of the parts, little monitoring and consequently little transparency or accountability, and no mechanism for information pooling, distillation of lessons learned, diffusion of best practices, or system-wide institutional learning. A small handful of HCPs did, however, more ambitiously attempt regional, multispecies, multilandowner solutions, and embraced principles of adaptive management to a limited extent.

Are HCPs an example of "civic environmentalism," of either the John or Shutkin variety? Very probably not. Considered as a whole, they do not appear to incorporate any of John's three presumptions: they rely principally on federal rather than state or local implementation and enforcement, in most cases (but with a few outliers) they are not broadly participatory, and they are not particularly voluntary, insofar as they depend upon a kind of forced cooperation under threat of enforcement of a harsh regulatory rule if negotiation fails. As for Shutkin's variant, arguably a few of the most ambitious re-

91. *See* Bradley C. Karkkainen, *Toward Ecologically Sustainable Democracy?*, *in* DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 208, 210–13 (Archon Fund & Erik Olin Wright eds., 2003) (distinguishing small bilateral HCPs from larger multi-party HCPs and acknowledging that the former are far more numerous).

92. Craig W. Thomas, *Habitat Conservation Planning*, *in* DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE, *supra* note 91, at 144, 153–56.

93. *See id.* at 154 ("[R]elatively few HCPs have been conceived in terms of adaptive management . . . .")

94. *See* Karkkainen, *Adaptive Ecosystem Management*, *supra* note 29, at 953–54 (contrasting the narrowly constrained version of adaptive management used in HCPs with more robust variants advanced by ecologists and others).

gional HCPs, especially those in southern California, come fairly close to his vision of integrated, regional-scale ecological and economic planning, but the program as a whole cannot be so characterized.

Setting aside the "civic environmentalism" label, are HCPs nonetheless a leading example of New Governance, as Lobel asserts? The answer, I submit, will depend upon what you count as New Governance. For those content to settle for bipolar environmental contracting as an attractive species of New Governance, HCPs may look rather appealing. For those committed to reflexive law solutions—Teubner, perhaps Orts, and possibly Lobel herself in her reflexive law moments—HCPs appear to miss the mark, as few incorporate principles of dynamic, reflexive self-regulation. For democratic experimentalists, HCPs—at least in the overall thrust of the program—must be rated a rather large disappointment, a promising possibility that falls well short of the mark in implementation.

CONCLUSION

In the end, my point is just this: New Governance is not a single model, but a loosely related family of alternative approaches to governance, each advanced as a corrective to the perceived pathologies of conventional forms of regulation. New Governance scholarship encompasses not just a single idea or school of thought, but many competing, sometimes incompatible schools, related perhaps in their broadest outlines, but nonetheless distinguishable along major fault lines that are largely masked in Lobel's account. Some versions are highly theoretical, others less so; some are derived largely from empirical observation, others more abstract and speculative. New Governance scholarship spans conventional disciplinary and subject-matter divisions, and embraces a variety of competing methodologies. It is a broad field, filled with intellectual ferment and contestation. It is, by my lights at least, an exciting and fertile field of inquiry, where much important work remains to be done.

Lobel's article does a more than creditable job of identifying some of the major strands of this emerging scholarship, and pointing to commonalities, convergences, and points of contact that entitle her to treat it as an interrelated whole. In this she does us all a service, and advances an important contribution to the literature. Unfortunately, at points the richness and vigor of the internal debates, and the clarity of the main lines of di-

vergence that separate some important strands of this scholarship from others, are obscured in Lobel's account, which for that reason must be regarded as several steps short of the "comprehensive roadmap" the author promises.[95]

None of this is intended, however, to detract from the very important positive contribution that Lobel makes in calling this scholarship to the attention of the larger legal academy, and in providing a highly readable general introduction to this vast, complex, rapidly growing, and exciting literature.

95. *See* Lobel, *supra* note 1, at 348 (promising "a comprehensive roadmap of the dimensions and organizing principles of the governance model").